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No. 92-613

Supreme Court, U.S.
FILED
DEC 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE HARRY AND JEANETTE WEINBERG FOUNDATION INCORPORATED,

Petitioner,

—v.—

CROYDEN ASSOCIATES and SERVICE AMERICA CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a class member that is not named as a party and fails to intervene as a party in a class action has standing to appeal an Order of the District Court, agreed to by the named parties and all other class members in the action, certifying the class and approving a settlement of the action.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as set forth in the caption. However, respondent Service America Corporation ("Service America") filed a petition for bankruptcy under Chapter 11 of the United States Bankruptcy Code on October 20, 1992, shortly after this proceeding was commenced. Service America and the certified class representative, Croyden Associates ("Croyden" and, collectively, the "Respondents"), submit that the automatic stay arising under the Bankruptcy Code prevents petitioner from continuing this proceeding. Service America joins in this brief solely because petitioner has improperly continued to pursue this proceeding against Service America in violation of the automatic stay. Croyden submits that the stay should preclude this Court from taking any action in this matter, but also addresses the substance of petitioner's arguments herein.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1992. A petition for rehearing *en banc* was denied on August 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner, The Harry and Jeanette Weinberg Foundation Incorporated (the "Weinberg Foundation" or "Petitioner"), is the lone member of a class seeking to disrupt the settlement of

a class action (the "Settlement") that resolved four years of hard-fought litigation over the respective liabilities of Alleco, Inc., formerly Allegheny Beverage Corporation ("Alleco"), and Service America concerning $105 million of debentures issued in 1985. The Settlement was agreed to by all of the named parties in the class action—Croyden, as the class representative, Alleco and Service America—after eleven months of intensive negotiations by Alleco, Service America, Croyden and a committee of other class members, consisting of sophisticated investment firms. It was then approved, after court-approved notice and a hearing, by the United States District Court for the District of Minnesota.

The Weinberg Foundation, the sole objector to the class action Settlement, was not a named party to the lawsuit and deliberately chose not to intervene in the class action before the District Court. Nonetheless, the Weinberg Foundation appealed the District Court's certification of the class and approval of the Settlement. Under these circumstances, the United States Court of Appeals for the Eighth Circuit, consistent with the precedents of this Court and the courts of appeals, properly held that the Weinberg Foundation lacked standing to appeal.

A. Factual Background

In August 1985, Alleco issued to the public $105 million principal amount of 9½% Senior Subordinated Convertible Debentures due 2010 (the "9½% Debentures"). (JA 372).[1] On December 2, 1987, Alleco sold the stock of Service America, which was then Alleco's last remaining operating subsidiary, to SAC Acquiring Corporation ("SAC"), a wholly-owned subsidiary of Servam Corporation ("Servam"). In consideration for the sale, Alleco received $345 million in cash and the assumption by SAC of Alleco's obligations under the 9½% Debentures. (JA 17, 374). Immediately following the consummation of the sale of Service America, SAC was merged into Service

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1 References in the form of "JA ____" are to the Joint Appendix submitted to the Eighth Circuit.

America, which thereupon became a wholly-owned subsidiary of Servam. (JA 17, 374).

In connection with the sale of Service America, on November 30, 1987, Alleco commenced an action in the United States District Court for the District of Minnesota against the indenture trustee for the 9½% Debentures, seeking a declaratory judgment that, following consummation of the sale of Service America and the execution of certain supplemental indentures, Service America would be solely liable for future payments of principal, interest and any applicable premium relating to the 9½% Debentures. (JA 17, 374). This action was captioned *Alleco, Inc. v. IBJ Schroder Bank & Trust Co.* (Civil File No. 3-87-0802) (the "Alleco Action").

Salomon Brothers, Inc., which then owned over $18 million principal amount of the 9½% Debentures (and later was a member of the committee that negotiated and approved the Settlement), intervened in the Alleco Action and filed a counterclaim seeking, *inter alia*, a declaration that Alleco remained liable for the payment obligations on the 9½% Debentures and that Alleco was in default of such obligations. In addition, the successor indenture trustee filed a counterclaim seeking a declaration that Alleco had not been released from its payment obligations.

By Memorandum and Order dated August 16, 1989, the District Court granted the successor trustee's motion for summary judgment against Alleco and Service America. The District Court entered judgment declaring, *inter alia*, that Alleco was not released from liability for the payment of principal and interest on the 9½% Debentures, but rather remained a co-obligor with Service America in respect of such obligations. (JA 25-26, 377).

The District Court's opinion did not terminate the disputes among the parties. Service America and Alleco both appealed the District Court's ruling and, on November 9, 1989, the District Court granted a request by Service America for a stay of any acceleration of the 9½% Debentures pending appeal.

(JA 27, 377-78). The District Court's November 9, 1989 Order took note of the "extraordinary procedural and substantive obstacles to [the] prompt and efficient resolution" of this litigation. (JA 378). The District Court also commented that "the complexity of the substantive issues involved presents a genuine chance of a different outcome on appeal." (JA 378).

While appeals to the Eighth Circuit were pending, Service America's financial condition continued to deteriorate, causing the company to halt interest payments on the 9½% Debentures. (JA 420-21). As a result, in mid-1990, a group of sophisticated financial institutions which held, in the aggregate, just over one-third of the $105 million aggregate principal amount of the 9½% Debentures (the "Committee") was organized to commence negotiations toward a consensual restructuring of Alleco's and Service America's obligations to the holders of the 9½% Debentures. (JA 354-57, 403, 406-08, 443-49, 803-918).

The Committee, which included Fidelity Investments, The Guardian Life Insurance Company and Salomon Brothers, Inc., was represented by counsel and financial advisors and performed extensive due diligence with respect to the financial affairs and prospects of Service America and Alleco. (JA 353-54, 371). Goldman, Sachs & Co. ("Goldman, Sachs"), which was not a member of the Committee, as general partner of Water Street Corporate Recovery Fund I, L.P., which held over $34 million of the 9½% Debentures, independently reviewed the Settlement with the assistance of separate counsel and agreed to its terms. (JA 371, 408-09, 450-52). The Weinberg Foundation was invited—but refused—to participate in these negotiations. (JA 345-50).

On March 20, 1991, after many months of negotiations, an agreement in principle was reached. The agreement in principle, which was ultimately embodied in the Settlement, involved the distribution of $11 million in cash from Alleco to the class members and the exchange of the 9½% Debentures for a package of new securities from Service America. The Committee unanimously determined that the Settlement provided for a

fair and adequate distribution of the limited resources of Alleco and Service America. (JA 352, 371).

Because Service America issued new debentures in connection with the Settlement, the Committee was concerned with the value of Service America as an ongoing entity after implementation of the Settlement. In order to be able to service the new securities, it was critical that few, if any, of the 9½% Debentures remain outstanding after the new securities were issued. Therefore, the Settlement was made contingent on the certification of a non-opt out class including all holders of the 9½% Debentures. (JA 363-64). Certification of a non-opt out class and the speedy closing of the Settlement were essential to enable Service America to complete its hoped-for reorganization, to ensure that the new securities issued by Service America to members of the class retained their value to the maximum extent possible and, most importantly, to ensure that all class members received a fair share of the limited funds of the two companies. (JA 351-64).

B. Proceedings And Decisions Below

1. The District Court Judgment

Croyden, a member of the Committee, commenced the present action by filing a complaint on May 14, 1991. (JA 10-35). The complaint sought, on behalf of the class, along with other relief, the payment of principal and interest on the 9½% Debentures, as well as a declaration of the rights of the class with regard to the acceleration and payment of the 9½% Debentures. (JA 34-35). This action was assigned to the same district judge who presided over the Alleco Action.

On May 14, 1991, Croyden moved the District Court for the entry of an order determining that the action could be maintained as a non-opt out class action and approving the form of notice to the class of a proposed settlement of the suit. (JA 36-114). On May 21, 1991, the District Court granted Croyden's class certification motion and scheduled a hearing with respect to the fairness of the proposed settlement for June 14, 1991.

(JA 115-20). Following continued negotiations among Alleco, Service America and the Committee, as well as their respective legal and financial advisors, Alleco, Service America and the holders of more than two-thirds of the aggregate principal amount outstanding of the 9½% Debentures (the members of the Committee and Goldman, Sachs) formally executed a settlement agreement on or about May 24, 1991. (JA 803-918).

On June 7, 1991, the Weinberg Foundation submitted objections to the Settlement and, through counsel, appeared and objected at the June 14, 1991 hearing. Throughout the proceedings below the Weinberg Foundation followed a consistent agenda: to allow the Settlement to go forward as to all other class members in order that Alleco and Service America could remain financially viable to pay the Weinberg Foundation a greater sum than that paid to other class members. Consistent with this strategy to further its own interests at the expense of the rest of the class, the Weinberg Foundation did not move to intervene in the action at any time or move to stay the effect of the District Court's judgment approving the Settlement. It merely objected to the Settlement.

The District Court entered a judgment on June 19, 1991 reaffirming the May 21, 1991 non-opt out certification of the class, approving the Settlement and finding that the Settlement was "in all respects, fair, reasonable and adequate to the Class, and within the authority of the parties." Pet. App. 19. Following this judgment, the Weinberg Foundation still did not move to intervene. Upon the motion of Service America, the District Court Judgment was amended on July 3, 1991, subject to a hearing scheduled for July 17, 1991. Resp. App. 2. However, without waiting for the scheduled hearing, and again without first intervening in the action, the Weinberg Foundation appealed the District Court Judgment on July 9, 1991, thus stripping the District Court of jurisdiction and preventing the July 17 hearing.

2. The Eighth Circuit Judgment

The Weinberg Foundation appealed the District Court Judgment to the Eighth Circuit. *Croyden Assoc. v. Alleco Inc.*, 969 F.2d 675 (8th Cir. 1992). On July 13, 1992, the Eighth Circuit dismissed the Weinberg Foundation's appeal for lack of standing because the Weinberg Foundation had failed to intervene before the District Court. *Id.* at 680.

In rejecting the Weinberg Foundation's attempt to appeal without having first intervened, the court below relied on this Court's recent decision in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and the decisions in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), and *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988). The court below properly held that the salient effect of requiring an unnamed class member to intervene as a condition of an appeal "is to channel into one line [of] litigation all issues of the class action settlement." *Croyden*, 969 F.2d at 680. In so holding, the court below followed the holding in *Guthrie* that such a rule furthers "the rationale of class actions: namely, to render manageable litigation involving numerous class members who otherwise would all have access to the court through individual lawsuits." *Id.* at 678 (*citing Guthrie*, 815 F.2d at 629). If separate appeals by individual unnamed class members were permitted, class action litigation "would become 'unwieldy,' and the purpose of class actions would be defeated." *Id.*

The court below also stated that:

> We believe it is particularly appropriate to require intervention as a condition for appeal when a class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members. This is such a case.

Croyden, 969 F.2d at 680. Indeed, as the court below properly noted, it is "telling" that the Weinberg Foundation was attempting to "gain full recovery on the debentures not available to the rest of the class." *Id.* at 678.

Following the decision of the court below, the Weinberg Foundation filed a petition to the Eighth Circuit for rehearing *en banc*, which was denied as untimely on August 24, 1992. The Weinberg Foundation filed its petition for a writ of certiorari on or about October 6, 1992 (the "Petition").

C. Service America's Bankruptcy Filing

On October 20, 1992, Service America sought the protection of chapter 11 of the Bankruptcy Code. Immediately upon filing for bankruptcy, Service America obtained the benefit of the automatic stay set forth in Section 362 of the Bankruptcy Code, which, Respondents assert, prohibits the continued pursuit of the Petition. This Court was so notified on November 5, 1992.

REASONS FOR DENYING THE WRIT

I. There Is No Split Among The Circuits

Contrary to the Weinberg Foundation's principal argument, there is no true conflict among the courts of appeals on the issue of whether unnamed class members may appeal from a final judgment entered by a district court in a class action without first seeking to intervene before the district court. Every single court of appeals that has considered this issue in recent years, including the Eighth Circuit in this case, has squarely held that an unnamed class member who fails to intervene has no standing to appeal from a judgment of the district court. *Croyden*, 969 F.2d at 680; *Walker*, 858 F.2d at 1074; *Guthrie*, 815 F.2d at 628-29; *see also In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 367-69 (7th Cir. 1992) (adopting same rule with respect to post-judgment orders).

The cornerstone of the court's holding below was *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987). There, the Eleventh Circuit held that an individual class member who was not a named plaintiff and who had not intervened had no standing to appeal the district court's entry of final judgment. As the Eleventh Circuit held, strong policy considerations support this rule:

> *First*, [unnamed class members] cannot represent the class absent the procedures provided for in Rule 23 of the Federal Rules of Civil Procedure. *Second*, class members who disagree with the course of a class action have available adequate procedures through which their individual interests can be protected. *Third*, class actions could become unmanageable and non-productive if each member could individually decide to appeal.

815 F.2d at 628.

With respect to its first rationale, the *Guthrie* court noted that "[t]he procedures for class actions are carefully set forth in Fed. R. Civ. P. 23. Named plaintiffs and counsel cannot represent a class in federal litigation until the district court makes certain findings, including that they will fairly and adequately protect the interests of the class." 815 F.2d at 628. As in *Guthrie*, because no finding was made by the District Court that the Weinberg Foundation would fairly and adequately protect the interests of the class, it clearly had no standing to take any action, including appealing the settlement agreement, on behalf of the class.

With respect to its second rationale, the *Guthrie* court noted that "a class member has the option of making a motion in the district court to intervene as of right in the course of the class action pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure. . . . Intervention is a means whereby class members can monitor the representation of their rights." 815 F.2d at 628.[2] The court noted that a denial of a motion to intervene as of right is appealable, so that no litigant would even arguably

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2 *Guthrie* also noted that an unnamed class member has two other means of challenging a district court's judgment in a class action: it may file a separate proceeding challenging the adequacy of class representation and may, in appropriate class actions, opt out of the class. *Guthrie*, 815 F.2d at 628. The *Guthrie* court noted that the case before it involved a non-opt out class, but nonetheless concluded that the unnamed class member's option of intervening was more than sufficient to protect its rights. *Id.* The court below reached the same conclusion. *Croyden*, 969 F.2d at 680. Petitioner's contention that the Eighth Circuit "vitiated *Guthrie*'s rationale" by applying it to a non-opt out class is thus without merit. Petition at 13-14.

be stripped of its ultimate right of appellate review. *Id. See also Shores v. Sklar*, 844 F.2d 1485, 1491 (11th Cir. 1988), *modified in part on other grounds after reh'g*, 885 F.2d 760, 761 n.1 (11th Cir. 1989) (reaffirming *Guthrie* and noting that a denial of intervention may be appealed "immediately").[3] As in *Guthrie*, the Petitioner here failed to move to intervene.

With respect to its third rationale, the *Guthrie* court reasoned that permitting direct appeals by individual class members "would defeat the very purpose of class action lawsuits" because:

> A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . A class cannot even be certified unless its members are so numerous that joinder is impracticable. Fed.R.Civ.P. 23(a)(1). If each class member could appeal individually, the litigation could become unwieldy.

815 F.2d at 629 (citation omitted).

This Court has endorsed the governing rule. In *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), individuals who were not parties to the underlying class action challenged a consent decree approving a class settlement. The appellants, like the Weinberg Foundation here, filed objections to the settlement, argued against the settlement at a hearing before the district court and asserted they were adversely affected by the settlement. *Id.* at 303-04. However, just like the Weinberg Foundation, the appellants failed to intervene in the action. This Court affirmed the dismissal of the appeal, stating:

> [W]e hold that because petitioners were not parties to the underlying lawsuit, and because they failed to intervene

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3 In one case decided between *Guthrie* and *Shores*, the Eleventh Circuit did not refer to the *Guthrie* rule and apparently permitted an appeal by an unnamed class member without inquiring whether that party had ever intervened. *See In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539 (11th Cir. 1987). However, *Shores* makes clear that *Guthrie* is still binding law in the Eleventh Circuit.

> for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement. . . . The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled. . . . We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.

Id. at 304.[4]

In *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988), the Fifth Circuit recognized that the *Guthrie* rule was supported by this Court's decision in *Marino*. *Walker*, 858 F.2d at 1074. It also found, like *Guthrie*, that "[a] contrary rule would result in the frustration of the purpose behind class litigation." *Id.* As the Fifth Circuit further explained in a subsequent opinion, requiring intervention as a precondition to appeal "effectuates the purpose of class action suits" by preventing piecemeal litigation which might result in inconsistent adjudications and might make it difficult to "determin[e] the res judicata effects of a judgment." *Baylor v. United States Dep't of Hous. and Urban Dev.*, 913 F.2d 223, 225 (5th Cir. 1990) (quoting *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1206-07 (5th Cir. 1981)).

The Seventh Circuit has also recently followed this reasoning. In *In re VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362 (7th Cir. 1992), an unnamed class member ("ERG") appealed the district court's order approving a sale of property pursuant to a class action settlement agreement. Although ERG had objected to the proposed sale in the district court, it never sought to intervene in the case. Relying on *Guthrie*, *Walker*, and the Eighth Circuit's decision below, the Seventh Circuit held that ERG lacked standing to appeal because allowing appeal absent intervention "would wholly thwart the purpose

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4 As the court below properly noted, although the appellants in *Marino* were not unnamed class members, "they were in a position similar to the Weinberg Foundation in that they were objecting to the approval of a settlement of the class action." *Croyden*, 969 F.2d at 679.

behind class actions" by allowing "thousands of unnamed Class members . . . to descend on this court to challenge each sale approved by the district court." 976 F.2d at 368.

The Tenth Circuit has recently indicated its approval of this rule as well. In *McNeil v. Guthrie*, 945 F.2d 1163 (10th Cir. 1991), involving the enforcement of a consent decree in a class action, the court cited *Guthrie* and *Walker* for the principle that an individual class member has "two avenues of relief" if he believes himself not adequately represented by named plaintiffs or class counsel, namely intervening in the action or filing a collateral suit. *Id.* at 1166, 1167. The court made no reference to a right of direct appeal absent intervention, and indeed could not have given its reliance on Fifth and Eleventh Circuit precedent.

Faced with these consistent decisions, the Weinberg Foundation posits a "conflict" among the circuits by relying principally on the Seventh Circuit's pre-*Marino* holding in *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). That court found that the appellant had waived any challenges to a consent decree by failing even to object to it before the district court, and, in *dictum*, distinguished the case from one in which a class member "intervenes or even appears . . . and objects to the dismissal or compromise," where a right of appeal was presumed. *Id.* at 1060 (citation omitted).[5]

The Weinberg Foundation's reliance on *Research Corp.* is curious, given the Seventh Circuit's more recent decision in *VMS*. While *VMS* did not explicitly disavow *Research Corp.*, it did not need to reach that issue. *VMS*, 976 F.2d at 368 n.8 ("we offer no opinion on the merit of *Guthrie*'s principle as applied

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5 In another Seventh Circuit case cited by petitioner, the objecting class members followed the precise procedure endorsed by the Fifth, Eighth and Eleventh Circuits, first moving to intervene and then appealing the denial of that motion. *See Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 310 (7th Cir. 1980). In *dictum*, however, the court noted that the objectors' intervention motion was not strictly necessary, relying on *Research Corp.* for the proposition that their objections before the district court gave them standing to appeal a settlement order. *Id.* at 327.

to an unnamed class member who appeals the approval of a consent decree"); *see also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 164 (7th Cir. 1988) (noting the holdings of *Guthrie* and *Walker*, but declining to address the merits of their approach because the application of that approach "would have no practical consequences in the present case"). Nonetheless, the Seventh Circuit explicitly followed the very decision below which the Weinberg Foundation is now challenging, as well as *Guthrie* and *Walker*. *VMS*, 976 F.2d at 367-68. By so doing, the Seventh Circuit has cast serious and substantial doubt on the continued viability of *Research Corp.*

The Weinberg Foundation's citation to a number of other older cases, where it was presumed that unnamed class members could appeal various orders, is equally unavailing. *See* Petition at 9-10. In none of those cases was the issue of whether unnamed class members must first intervene as a precondition to appeal directly confronted. Thus, as the court below correctly noted, none of these cases "faced the issue of standing" raised herein. *Croyden*, 969 F.2d at 680.[6] Moreover, every single one of these cases pre-dates *Marino*, *Guthrie*, *Walker*, *Croyden* and *VMS*, and it is thus doubtful that the old cases are still good law even if applicable.

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6 *See, e.g., In re Cement Antitrust Litig.*, 688 F.2d 1297, 1308-10 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983), and *Arizona v. United States Dist. Court*, 459 U.S. 1191 (1983) (the word "party" in a statute governing disqualification of judges on the ground they have a financial interest in a party includes unnamed class members, among other things because class members are given the other substantive "benefits and burdens" of parties including *res judicata* and the right of appeal); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (class member could not collaterally attack a two-year old settlement agreement in which he was adequately represented because, if he was dissatisfied, he should have appealed); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977) (named representatives of defendant class who in related actions were also classified as unnamed members of plaintiff class had standing to appeal regardless); *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32-33 (3d Cir. 1971) (class members had not waived their appellate rights by opting in to a class settlement).

Finally, the Weinberg Foundation claims that the decision below "appears to conflict in principle" with other pre-*Marino* cases in which non-parties were permitted to appeal because they were affected by a district court judgment. Petition at 10. In *Marino*, however, this Court directly rejected the "affected interest" rationale for non-party standing, explaining that it conflicts with well-settled precedent and that the appropriate course for non-parties to preserve a right to appeal is a motion to intervene in the district court. *Marino*, 484 U.S. at 304 ("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment is well settled.").

Each of the cases relied upon by the Petitioner predates *Marino*. In addition, many of the cases the Weinberg Foundation cites for this point do not even involve class actions. They therefore do not implicate the concern specially applicable to that context: the adverse impact on manageability that would ensue if all unnamed class members were permitted individual appeals from a district court's judgment, without ever seeking to intervene before the district court.

Since *Marino*, every court of appeals that has addressed this question has held against the position advanced by the Weinberg Foundation. To the extent there is any conceivable conflict in light of *Marino* and its progeny, it exists only because the courts of appeals involved have not considered the question in recent years. This Court will benefit by allowing the issue to percolate further among the courts of appeals to resolve any potential post-*Marino* conflicts that may arise. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting the benefits of "permitting several courts of appeals to explore a difficult question before this Court grants certiorari"); *E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (recognizing "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals," thereby eliminating subsidiary questions and "vastly simplif[ying]" the Court's task).

II. There Is No Other Compelling Reason For The Court To Grant Certiorari

The Weinberg Foundation argues that this Court should issue a writ of certiorari because the line of cases followed by the court of appeals below "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision" and because the decision below raises a question of the federal courts' supplemental jurisdiction "which ought to be settled by this Court." Petition at 14, 19. Both of these arguments are entirely without merit.

A. Requiring Intervention By Unnamed Class Members As A Condition To Appeal Is Entirely Consistent With The Usual Course of Class Action Proceedings

The decision below—which followed this Court's decision in *Marino* and the recent decisions of several other courts of appeals—is fully consistent with the "accepted and usual course of judicial proceedings" in class action lawsuits. As set forth in Point I above, strong policy considerations support the rule requiring an unnamed class member to intervene in a class action as a condition to appeal. *See supra* pp. 8-14. The Weinberg Foundation's scattershot arguments do not in any way undercut the soundness of this rule.

The Weinberg Foundation argues, first, that the rule is contrary to the usual course of "managing class actions." Petition at 15-16. In fact, the rule actually safeguards the integrity of class actions, rather than undercutting their rationale. Class actions are designed to render manageable litigation which would otherwise be chaotic, unwieldy and duplicative, by gathering together in a single forum the claims of numerous plaintiffs who would all otherwise be entitled to file individual lawsuits. *See Croyden*, 969 F.2d at 678; *Guthrie*, 815 F.2d at 629; *Walker*, 858 F.2d at 1074; *see also* Fed. R. Civ. P. 23(b)(1) advisory committee's note (1966 Amendment) ("[t]he difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of

the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device"); 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure*, § 1751, at 7 (2d ed. 1986). The Weinberg Foundation itself concedes that there should be "economy in allocating the scarce judicial resources required to manage class actions." Petition at 18.

"If each class member could appeal individually, the litigation would become 'unwieldy,' and the purpose of class actions would be defeated." *Croyden*, 969 F.2d at 678 (citing *Guthrie*). As the Seventh Circuit correctly observed in *VMS*, allowing unnamed class members who have never intervened to appeal would enable numerous class members "to descend on [the appellate] court," each representing "its own interest" at odds with the interests of the class as a whole. *VMS*, 976 F.2d at 368. The court-approved settlement, found to be in the interests of the class as a whole, could be held up indefinitely. This concern has certainly been borne out in this case, despite the fact that the Weinberg Foundation's "challenge to the adequacy of a settlement is contrary to the view of all the other class members." *Croyden*, 969 F.2d at 680. Further, the limited funds available to settle class claims could be diluted by the costs of unnecessary appellate litigation.[7] And, the multiplicity of appeals could potentially overwhelm the circuit courts and create a risk of inconsistent adjudications by different appellate panels.

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7 One of the principal bases for class action certification under Fed. R. Civ. P. 23(b)(1)(B), the operative provision in this case, is the existence of a limited fund which is insufficient to satisfy all plaintiff claims in full. The class action certification protects the interests of the class as a whole by ensuring that all class claims will be adjudicated simultaneously and any proceeds shared *pro rata*. *See* 7A C. Wright, A. Miller & M. Kane, *supra*, § 1774 at 441-42; 3B James Wm. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.35[2] at 23-249-51 (2d ed. 1991). This mechanism would be undermined if disgruntled unnamed class members were permitted to pursue piecemeal appeals from class settlements, because the cost of defending the appellate litigation would come out of the already limited funds set aside for settlement of the class claims as a whole.

The rule requiring intervention as a condition to an appeal by an unnamed class member is thus a reasonable device designed to protect the very values which underlie class actions in the first place. As the court below explained, "by requiring intervention as a condition of an appeal, the effect is to channel into one line of litigation all issues of the class settlement." *Croyden*, 969 F.2d at 680. The district court is thus given the opportunity to hear all substantive challenges to the settlement in the first instance, and to simplify issues for appeal by consolidating intervention motions brought on similar grounds by different class members.

The decision below is not in any way inconsistent with this Court's decision in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 551 (1974), which, contrary to the Weinberg Foundation's argument, did not hold that intervention was generally inappropriate in the class action context. Petition at 16. In *American Pipe*, the issue was whether individual class members should be required to intervene prior to the class certification hearing simply to prevent the running of the statute of limitations against them in the event no class was certified. The Court held that the filing of a class action tolled the running of the statute of limitations, so that otherwise timely individual suits by would-be class members would not be time-barred in the event class certification was denied. 414 U.S. at 551. This Court's subsequent holding in *Marino* makes clear that intervention in a class action is not only appropriate, it is the required course to preserve a right of appeal. *Marino*, 484 U.S. at 304.

The Weinberg Foundation's next argument, that the holding of the court below would somehow force class members to move to intervene at the initial stages of the action, even "before seeking to opt out," is equally unsound. Petition at 17. This contention fundamentally misreads the Eighth Circuit's decision, which does not require intervention before the district court's resolution of the class certification issue, or at any other particular time in the litigation. The decision instead properly requires class members to move to intervene, at *any* time in the

district court litigation, before appealing a court-approved settlement agreement.

The Weinberg Foundation's remaining arguments are equally without merit. First, the Weinberg Foundation argues that this Court should grant certiorari because the decision of the court below abandoned "traditional methods of practice . . . abruptly and without compelling reason." Petition at 18. In fact, there was nothing the least bit abrupt about the Eighth Circuit's decision: it was distinctly foreshadowed over the course of five years by this Court's ruling in *Marino* and two circuit court decisions. The Weinberg Foundation was no doubt aware of this case law when it objected in the district court, yet it deliberately determined not to intervene. The Weinberg Foundation presumably did not wish to delay or disrupt the settlement as to the remainder of the class, which was intended to preserve Service America's financial viability. It simply wished to wait until that viability was assured and then seek relief which might afford it a more beneficial settlement than that available to the class as a whole.

Second, the Weinberg Foundation complains that it is bound by the class action judgment, and therefore *ipso facto* must be the proper party to appeal. This ignores the whole concept of a class action, in which the class representative, having been certified as appropriate for that role, is given the authority to make litigation decisions for the class, including whether to bring an appeal from a final judgment. If an unnamed member of the class does not believe that party can adequately represent its interests on appeal, its settled recourse is to move to intervene as a named party. *See Guthrie*, 815 F.2d at 628, *citing* 7B C. Wright, A. Miller & M. Kane, *supra*, § 1786, at 196 ("Intervention is a means whereby class members can monitor the representation of their rights.").

Finally, the Weinberg Foundation's assertion that it must be granted standing to appeal without first intervening because the court-approved settlement in this case barred class members from relitigating their substantive claims against Alleco and Service America in separate actions is equally without basis.

Petition at 16-17.[8] Settlement agreements by definition include, as a *quid pro quo* for providing agreed-upon relief to plaintiffs, a provision releasing defendants from further claims of liability arising out of the events at issue in the settled lawsuit. If this release were deemed an "injunction" allowing unnamed class plaintiffs an automatic direct appeal, as the Weinberg Foundation contends, settlement agreements would be robbed of the essential element on which they are based: the assumption of finality. Defendants would have little incentive to reach settlement agreements if they were to remain exposed to the continual threat of relitigation of the underlying merits. This is particularly true in large class action suits. *Cf. VMS*, 976 F.2d at 368 ("The settlement in this class action will completely unravel if the thousands of unnamed Class members are free to descend on this court to challenge each [post-settlement order] approved by the district court.").

The Weinberg Foundation's contention that the decision below means that class members will never have an opportunity to obtain appellate review of settlement releases is without merit. As every circuit to adopt this rule has made clear, it does not cut off avenues of appeal, but requires that the unnamed class member first intervene as a named party. If the district court denies a motion to intervene, that ruling is immediately appealable. *See Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1074; *Guthrie*, 815 F.2d at 628.

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8 Petitioner argues that the relitigation bar prevents it from collaterally attacking the adequacy of the class representation, an avenue of challenge presumed available in *Guthrie*. Petition at 13-14. It did not make this argument before the Eighth Circuit, and never attempted to bring such a collateral suit at any time. *See Croyden*, 969 F.2d at 680 (parties before Eighth Circuit "seem[ed] to assume that other avenues of collateral attack were open"). For the reasons stated below, petitioner should not be permitted to raise new issues for the first time on a petition for a writ of certiorari. *See infra* Point II B.

B. Petitioner's Argument Concerning 28 U.S.C. § 1367(b) Was Never Raised Below And, In Any Event, Is Baseless

The Weinberg Foundation's argument that the court below erred because it "makes no mention of 28 U.S.C. § 1367(b)," which statute the Weinberg Foundation claims prevented it from intervening in the district court, is a classic red herring. The court below did not mention that statute because the Weinberg Foundation never raised this issue before that court, either in its original motion papers or in its petition for rehearing *en banc*.

The Weinberg Foundation made a tactical decision not to attempt to intervene in the district court, thereby avoiding having to test its construction of Section 1367(b) in that court. The Weinberg Foundation's reply brief before the Eighth Circuit conceded that its failure to move to intervene was deliberate, arguing that it did not intervene because the motion would likely have been denied by the district court. Pet. CA Reply Br. at 5. Not only did the Weinberg Foundation *never* argue that its motion to intervene would have been denied due to Section 1367(b), it also decided not to raise the issue of Section 1367(b) before the Eighth Circuit. In these circumstances, its criticism of the Eighth Circuit for not mentioning this issue comes with ill grace. *See* Petition at 21 ("the genesis of its error" was that it "did not analyze whether or not the Foundation was entitled to intervene"). Further, if the Weinberg Foundation had attempted to intervene, and if the district court denied the motion in reliance on Section 1367(b), the decision would have been immediately appealable. Having deliberately foregone this avenue of challenge, the Weinberg Foundation cannot now argue that it is being denied access to appellate review because of Section 1367(b).

This Court has repeatedly declined to consider issues that were never raised before the courts below. *See, e.g., Evans v. U.S.*, 112 S. Ct. 1881, 1904 n.9 (1992); *Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *Kamen v. Kemper Fin. Servs.*, 111 S. Ct. 1711, 1717 (1991); *DeShaney v. Winnebago*

County Dep't of Social Servs., 489 U.S. 189, 195 n.2 (1989); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *Equal Employment Opportunity Comm'n v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986); *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628 n.10 (1982); *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 323 n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) (stating that only in "exceptional cases" will the Court reach out to decide questions neither "pressed or passed upon below").

There are no compelling circumstances warranting departure from this settled practice here. The Weinberg Foundation has not proceeded *pro se*, but rather was represented by experienced counsel at every stage of this litigation. It had three separate opportunities to raise its Section 1367(b) argument (before the District Court, the Eighth Circuit, and on petition for rehearing), but failed to do so at each turn. Moreover, contrary to the Weinberg Foundation's assertion, there was nothing "jurisdictional" about the argument it failed to raise such that the Eighth Circuit was obligated to consider the issue *sua sponte*. Petition at 21. The Eighth Circuit undeniably had jurisdiction over the Weinberg Foundation's appeal pursuant to 28 U.S.C. § 1291. The Weinberg Foundation in fact acknowledged the Eighth Circuit's jurisdiction in its opening brief to that court. *See* Pet. CA Br. at xiv.

In any event, the Weinberg Foundation's argument that Section1367(b) would have barred its intervention is meritless. As set forth below, that statute's restrictions on intervention by nondiverse parties do not apply to unnamed class members in class action suits.

It has long been settled that in class actions brought in federal court under the diversity statute, only the named class representatives must have diverse citizenship from the opposing parties; the citizenship of unnamed class members is disregarded. *See Snyder v. Harris*, 394 U.S. 332, 340 (1969);

Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364 (1921); *In re School Asbestos Litig.*, 921 F.2d 1310, 1317 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1623 (1991); *In re "Agent Orange" Prods. Liab. Litig.*, 818 F. 2d 145, 162 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). Prior to the enactment of Section 1367(b) in 1990, it was also settled that the intervention of unnamed but nondiverse class members in a diversity-only class action would not defeat federal jurisdiction. *See Ben-Hur*, 255 U.S. at 366; *Zimmerman v. Bell*, 101 F.R.D. 329, 332 (D. Md. 1984); 7A C. Wright, A. Miller & M. Kane, *supra*, § 1755 at 64. This rule was consistent with the general principle that the federal courts could exercise ancillary jurisdiction over all interventions as of right pursuant to Fed. R. Civ. P. 24(a). *See Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375 n.18 (1978); *Sweeney v. Athens Regional Medical Ctr.*, 917 F.2d 1560, 1565 (11th Cir. 1990); *Babcock & Wilcox Co. v. Parsons Corp.*, 430 F.2d 531, 540 (8th Cir. 1970).

The Judicial Improvements Act of 1990, Pub. L. No. 101-650, 1990 U.S.C.C.A.N (104 Stat.) 5089, modified the general principle regarding intervention as of right in diversity actions, providing that the district courts would no longer have jurisdiction over intervention claims when "exercising of supplemental jurisdiction [over such claims] would be inconsistent with the jurisdictional requirements of section 1332." 28 U.S.C. § 1367(b). However, Congress specifically stated that this change was not meant to alter the rules developed by the courts to manage complex class action lawsuits. In the words of the House Report accompanying the statute's passage, which is the pertinent legislative history, *see* Thomas M. Mengler et. al., *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 215 n.19 (1991), Section 1367(b) "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions as those requirements were interpreted prior to this Court's decision in [*Finley v. United States*, 490 U.S. 545 (1989)]". H.R. Rep. No. 734, 101st Cong., 2d Sess. 29, reprinted in 1990 U.S.C.C.A.N. 6802, 6875 (hereafter "House Report"). The House Report then cited *Ben-Hur*, which, as

stated above, held that only the named plaintiff in a class action must meet diversity requirements and that later intervention by a nondiverse party would not destroy federal jurisdiction. *Id.*

Courts in the handful of cases since 1990 that have considered whether Section 1367(b) altered the jurisdictional requirements applicable to class actions have relied upon this legislative history in holding that the statute did not alter those requirements. *See Averdick T.A. v. Republic Fin. Servs., Inc.*, 803 F. Supp. 37 (E.D. Ky. 1992) (Section1367(b) did not affect the rules governing whether individual class members may aggregate their claims to satisfy the jurisdictional threshold of Section 1332, *citing* House Report); *Bradbury v. Robertson-Ceco Corp.*, No. 92 C 3408, 1992 WL 178648, at *2 (N.D. Ill. July 22, 1992) (same).

III. This Court Should Not Grant The Writ Because The Weinberg Foundation's Continuation Of This Proceeding Violates the Automatic Stay

Wholly independent of the foregoing, the Petition is particularly inappropriate and must be denied because there is no defendant against whom Petitioner may properly proceed, and, therefore, this Court cannot grant Petitioner any meaningful relief. The class action has two defendants, Alleco and Service America. Alleco is not a respondent herein because its pending bankruptcy precluded the Eighth Circuit from taking any action regarding Alleco. *Croyden*, 969 F.2d at 677.[9] Since Service America is now in bankruptcy, the automatic stay set forth in Section 362 of the Bankruptcy Code prohibits the continuation of this action against it. Thus, this Court cannot issue any order respecting either of the defendants.[10]

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9 Following the issuance of the Eighth Circuit's judgment, Alleco sought and obtained permission from its bankruptcy court to request that the Eighth Circuit amend its judgment to extend its effect to Alleco. Both Alleco and the Weinberg Foundation have briefed this issue before the Eighth Circuit. To date, no decision has been issued.

10 At the time the Weinberg Foundation filed the Petition, only Alleco was in bankruptcy. Service America sought the protection of chapter 11 of the Bankruptcy Code on October 20, 1992. Despite the fact that over

The automatic stay created by section 362 of the Bankruptcy Code is " 'one of the fundamental debtor protections provided by the bankruptcy laws.' " *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 503 (1986) (citations omitted). The express language of section 362 leaves no doubt that the Weinberg Foundation is prohibited absolutely from continuing any judicial proceeding, including appeals, with respect to Service America:

> (a) [A chapter 11] petition . . . operates as a stay, *applicable to all entities*, of—
>
> > (1) the *commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title*, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1) (emphasis added). Well-settled case law also makes this clear. *See, e.g., Interstate Commerce Comm'n v. Holmes Transp., Inc.*, 931 F.2d 984, 987 (1st Cir. 1991) ("section 362 stays both the commencement and the continuation of all actions and proceedings"); *Borman v. Raymark Indus., Inc.*, 946 F.2d 1031, 1033 (3d Cir. 1991) ("the automatic stay under § 362(a)(1) extends to appeals in actions that were originally brought against the debtor, regardless of whether the debtor is the appellant or the appellee"); *In re Tampa Chain Co.*, 835 F.2d 54, 55 (2d Cir. 1987) (section 362 "operate[s] to stay the continuation of . . . appeal[s] as to [the debtor]").

The Weinberg Foundation itself recognized this principle in this very case. During the pendency of the Weinberg Founda-

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five weeks have now passed since the automatic stay prohibited the Weinberg Foundation from pursuing the Petition against Service America, the Weinberg Foundation has taken no steps either to withdraw the Petition as against that bankrupt defendant or to request that the Bankruptcy Court lift the automatic stay to permit the pursuit of the Petition.

tion's appeal to the Eighth Circuit, Alleco filed for bankruptcy and the Weinberg Foundation agreed that the appeal could not proceed against Alleco. Petition at ii, n.1. Similarly, the appeals court below held that the automatic stay prevented continuation of the appeal against Alleco. *Croyden*, 969 F.2d at 677. Because Service America was not in bankruptcy at the time, however, the Eighth Circuit permitted the appeal to continue. *Id.*

However, there now is no defendant against whom this action may proceed and, therefore, no possibility that this Court could award the Petitioner the relief it seeks. As this Court has recently emphasized, to establish a case and controversy under Article III, a litigant must establish that its injury "is likely to be redressed by a favorable decision." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (*quoting Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976)).[11]

Thus, even if the Weinberg Foundation had standing to appeal (which it does not, *see supra* Points I and II), the Court should not grant the Petition because the ultimate relief it seeks in challenging the Settlement cannot be granted by any court while both defendants are in bankruptcy. Before pursuing the Petition further, the Weinberg Foundation must first seek relief from the automatic stay in the bankruptcy court.[12] This Court should not reach out to grant the Petition since resolution of the issues raised therein will be tantamount to an advisory opinion.

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11 *See also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) ("a litigant must have suffered . . . an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision"); *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70 (1983) ("To satisfy the Art. III case-or-controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) ("It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character").

12 That the Weinberg Foundation has not done so is symptomatic of the unwillingness to follow proper procedures which has characterized its actions throughout these proceedings.

CONCLUSION

For all the foregoing reasons, the requested writ of certiorari should be denied.

Dated: New York, New York
December 23, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil No. 3-91-323

CROYDEN ASSOCIATES, individually and as representative of a class of those similarly situated,

Plaintiff,

—v.—

ALLECO INC. and SERVICE AMERICA CORPORATION,

Defendants.

ORDER

WHEREAS, on May 21, 1991, this Court issued an Order certifying that this action be maintained conditionally as a class action for settlement purposes and approving the form and content of the Notice of Pendency of Action, Class Action Determination, Proposed Settlement, Settlement Hearing and Right to Appear (the "Original Notice"), the Summary Notice and the Proof of Claim and Release;

WHEREAS, on June 14, 1991, a hearing (the "Settlement Hearing") was held to determine whether the proposed settlement of this action (the "Settlement") is fair, reasonable and adequate to the members of the Class and should be approved by the Court; and

WHEREAS, on June 19, 1991, a Final Judgment and Order of Dismissal (the "Judgment") was entered in which the Court approved the Settlement as fair, reasonable and adequate to the members of the Class and dismissed the Action and the related Alleco Action;

WHEREAS, Service America Corporation ("Service America") has moved, pursuant to Rule 59(e), or, in the alternative, Rule 60(b), to Amend the Judgment in order to effectuate a proposed amendment (the "Proposed Amendment") to the Settlement;

IT IS HEREBY ORDERED that:

1. A hearing (the "Hearing") shall be held before the Court on July 17, 1991, at 4:30 p.m. in the United States District Court for the District of Minnesota, Third Division, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101, in order to determine (a) whether the Proposed Amendment to the Settlement Agreement (the "Settlement Agreement") should be approved as fair, reasonable and adequate; (b) whether the Judgment should be amended in order to effectuate the Proposed Amendment to the Settlement; and (c) such other matters as the Court may deem appropriate. The Court may adjourn or cancel the Hearing or any adjournment thereof without further notice to members of the Class other than by announcement at the Hearing or any adjournment thereof.

2. The Court approves, in form and content, the Notice of Proposed Amendment to the Settlement and Proposed Amended Judgment, Settlement Hearing and Right to Appear (the "Notice of Proposed Amendment") attached as Exhibit 1 hereto, and finds that the mailing and distribution of the Notice of Proposed Amendment substantially in the manner and form set forth in paragraph 3 of this Order, in combination with the prior mailing of the Original Notice, Summary Notice and Proof of Claim and Release, the prior publication of the Summary Notice and the mailing and distribution of the Supplemental Notice approved by this Court's Order of June 19, 1991, meets the requirements of Rule 23 of the Federal Rules of Civil Procedure and of due process, is the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons entitled thereto.

3. At least fourteen (14) days before the Hearing, defendant Service America shall cause a copy of the Notice of

Proposed Amendment to be delivered by hand or by overnight courier to all persons and entities appearing on transfer records as holders of 9½% Debentures as of the date of this Order, at their addresses listed on such transfer records. Service America shall use reasonable efforts to give notice to beneficial owners of 9½% Debentures by making additional copies of the Notice available to any record holder requesting the same for the purpose of distribution to beneficial owners. At or before the Hearing provided for in paragraph 1 of this Order, Service America shall file proof, by affidavit, of such mailings.

4. At the Hearing, any member of the Class who desire to do so may appear personally or by counsel, providing an appearance is filed and served as hereinafter provided, and show cause, if any, why the Proposed Amendment to the Settlement should not be approved as fair, reasonable and adequate, or why the Judgment should not be amended in order to effectuate the Proposed Amendment to the Settlement; provided, however, that no member of the Class or any other person shall be heard or entitled to object to or otherwise contest this Court's prior approval of the terms and conditions of the Settlement or the Judgment rendered thereon. Instead, any objections made shall be strictly limited to the Proposed Amendment to the Settlement and the Proposed Amendment to the Judgment. It is further provided that no member of the Class or any other person shall be heard or entitled to contest the approval of the terms and conditions of the Proposed Amendment to the Settlement and, if approved, the amended judgment to be entered thereon, and no papers or briefs submitted by any member of the Class or any other person shall be received and considered, except by Order of the Court for good cause shown, unless, no later than seven days prior to the Hearing, copies of (a) a notice of intention to appear, (b) a detailed statement of such person's specific objections to any matter before the Court, and (c) the grounds for such objections and any reasons for such person's desiring to appear and to be heard, as well as all documents and writings such person

desires this Court to consider, shall be served upon the following counsel:

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and then filed with the Clerk of Court. Unless the Court otherwise directs, no member of the Class shall be entitled to object to the Proposed Amendment to the Settlement or to the amended judgment to be entered thereon, or otherwise to be heard, except by serving and filing written objections as described above. Any person who fails to object in the manner provided above shall be deemed to have waived such objections and shall forever be barred from making any such objection in this Action or in any other action or proceeding.

5. All costs of notifying the Class members shall be paid by Service America. Service America also shall reimburse brokerage firms and other record holders who are not also beneficial holders of 9 1/2% Debentures for their out-of-pocket expenses actually and reasonably incurred in supplying a copy of the Notice of Proposed Amendment to such beneficial owners. Service America shall not be required to pay (i) any fees or other charges of such record holders that are attributable to time spent by or on behalf of such record holders in identifying their customers who beneficially own 9 1/2% Debentures or providing copies of the Notice of Proposed Amendment to such beneficial owners or (ii) any other fees claimed by record holders that are not attributable to out-of-pocket expenses actually and reasonably incurred by such record holders in providing copies of the Notice of Proposed Amendment to beneficial owners of 9 1/2% Debentures. Service America shall not be required to reimburse record holders for their out-of-pocket

expenses until after such record holders have forwarded copies of the Notice of Proposed Amendment to their customers and submitted an invoice to Service America for such out-of-pocket expenses.

6. The Court reserves the right to approve the Proposed Amendment to the Settlement Agreement with or without modifications and to amend its Judgment dismissing this Action on the merits and with prejudice without further notice to members of the Class, and retains jurisdiction over this action to consider all further applications arising out of or connected with the proposed Settlement.

BY THE COURT:

/s/ PAUL A. MAGNUSON
The Honorable Paul A. Magnuson
JUDGE OF DISTRICT COURT

Dated: July 3, 1991